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No. 995

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

WILLIAM H. WILSON and ADRIANA WILSON,
*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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WILLIAM H. WILSON and ADRIANA WILSON,

*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on January 9, 1963.

### Opinions Below

The memorandum opinion of the Tax Court on motion to dismiss (P10a) is unreported. The opinion of the Circuit Court of Appeals (p. 13, *supra*) is unreported.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 9, 1963 (p. 14, *supra*). There was no request for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented

1. Does a taxpayer have a right to a hearing in the Tax Court of the United States on an income tax deficiency alleged by the Commissioner of Internal Revenue where a petition for redetermination is filed by the taxpayer within 90 days of the first actual notice of such alleged deficiency?

2. Is a taxpayer's right to such hearing lost by reason of the fact that the Commissioner attempted to issue a statutory notice of deficiency, but such notice was not delivered to the taxpayer through no fault of taxpayer but such notice was returned to the Commissioner, who thereafter did nothing to give actual notice to the taxpayer until after expiration of the 90 day period from the date of issuance?

3. Does the mere mailing by the Commissioner of a notice of deficiency to a taxpayer who has kept the Commissioner advised of his last known address, start the tolling of the 90 day period for filing of a petition for redetermination in the Tax Court, if such notice is not delivered to the addressee but is returned to the Commissioner?

4. Is the constitutional right of a private litigant to notice and an opportunity to be heard diminished merely because that litigant's adversary is the United States of America and the subject of the litigation is taxes sought to be assessed against such litigant?

## Statutory and Constitutional Provisions Involved

The following provisions of the Constitution and statutes of the United States, which are applicable hereto, are set forth verbatim:

1. Amendment Five, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be depriced of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

2. 26 U.S.C., (1958 ed.) 6212 (a) and (b) provides in part as follows:

> (a) In General—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.
>
> (b) Address For Notice of Deficiency—
>
> (1) Income and Gift Taxes—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.
>
> (2) Joint Income Tax Returns—In the case of joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice

except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by registered mail to each spouse at his last known address.

3. 26 U.S.C. (1958 ed.) Section 6213 (a) provides as follows:

(a) Time for Filing Petition and Restriction on Assessment—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

4. 26 U.S.C. (1952 ed.), Section 272, relating to the sending of the notice of deficiency by the Commissioner to the Tax Court, and Section 272K relating to the address of the notice of deficiency, are applicable for the tax years

1950 through 1953. Insofar as this case is concerned, those sections are substantially the same as Sections 6212 and 6213 and, consequently are not set forth herein.

## Statement of the Case

The Commissioner allegedly issued a notice of deficiency under date of January 17, 1961 (P3a). This letter alleged a deficiency of taxes and penalties amounting to $89,669.20 which, with interest, would exceed the sum of $125,000.00.

This notice of deficiency was mailed to the petitioners at their residence, 201 Bell Avenue, Hasbrouck Heights, and to an office address at 345 Boulevard, Hasbrouck Heights, New Jersey. It is uncontroverted that neither of these letters was ever delivered to the petitioners and that both letters were returned to the Commissioner undelivered (P8a).

After the undelivered letters were returned to the Commissioner he took no action whatsoever for more than ninety days (P8a). Commissioner made no attempt to discover why the letters had not been delivered, nor did he attempt in any way to give any notice to the petitioners. Throughout that period, petitioners still lived and worked at the said addresses which fact was known to the Commissioner (P8a).

The Commissioner's next attempt to communicate with the petitioners did not occur until after the lapse of ninety days from the aforementioned date of January 17, 1961, when on or about May 24, 1961, the Commissioner mailed notice of assessments to them (P8a). These were sent by regular mail and delivered promptly to the petitioners. One of the petitioners, William Wilson, immediately telephoned the District Director's Office and on May 26, 1961, wrote to the District Director's Office requesting an explanation for the assessment.

Petitioners retained counsel and an attempt was made to prepare a petition for redetermination. However, it was first necessary to obtain the alleged notice of deficiency. Petitioners did not receive such a notice of deficiency until July 25, 1961 (P8a).

Petitioners prepared and filed a petition in the Tax Court, which was mailed and postmarked August 4, 1961. It was received August 7, 1961 (P3a). The petition in this case was filed within ten days from the date that the petitioners first received a copy of the Commissioner's determination, within ninety days of the date petitioners first received notice of the alleged assessment, which had been given on May 24, 1961.

No reason has ever been disclosed for the non-delivery of the alleged notices of January 17, 1961. It should be noted, however, that a snowfall of more than twenty inches occurred in the northern New Jersey area on the days immediately following January 17, 1961. This snowfall, which was the State's heaviest in more than a decade, seriously disrupted mail service and communication. It is quite likely that this is the reason for the non-delivery of the Commissioner's letter to the petitioners (P8a).

The Commissioner moved before the United States Tax Court of Appeals to dismiss the petition for lack of jurisdiction. In answer to the motion, petitioners filed an objection (P2a).

On November 22, 1961, the matter was argued before Judge ARUNDELL of the Tax Court (P2a). He ruled from the bench that the motion to dismiss was granted. A written order pursuant to the Court's ruling was entered on January 2, 1962.

An appeal was thereupon taken to the United States Circuit Court of Appeals which affirmed the decision of the Tax Court of the United States.

Throughout these proceedings petitioners have acted with reasonable dispatch and as quickly as they could under the circumstances.

The full amount of the alleged tax deficiency, interest and penalties, which exceeds $125,000.00, is still due and owing and petitioners have not been able to pay the same.

Petitioners believe that no tax is due and owing and that upon a review of the Commissioner's determination, sufficient facts and documentation will be produced to establish the error of the Commissioner in finding any deficiency.

## Manner in which Federal Question Raised

The Federal questions were raised (1) by respondent's motion to dismiss petitioner's petition for determination of deficiency, and (2) by petitioner's objection to such motion and briefs, affidavits and oral argument of petitioner in support of such objection in the Tax Court.

## Reasons for Granting the Writ

1. The decision of the Court below in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Tenzer* v. *Commissioner*, 285 F. 2d 956 and *Rosewood, Inc.* v. *Commissioner*, 275 F. 2d 786 and *Eppler* v. *Commissioner*, 188 F. 2d 195 and *Boren* v. *Riddell*, 241 F. 2d 670 and conflicts in principle with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Stewart*, 186 F. 2d 239.

All of the cited decisions of the Ninth Circuit and the Sixth Circuit take the position that the purpose of the deficiency notice provided for under Section 6212 is to give the taxpayer actual notice that the Commissioner means to assess a deficiency tax against him and to give him an opportunity to have such determination reviewed by the Tax

Court. Thus, in the *Tenzer*, *Roeswood Hotel* and *Eppler* cases it was held that the 90 day period within which a petition for redetermination could be filed with the Tax Court, commenced to run from the date of actual notice to the taxpayer and not from the date of mailing by the Commissioner. In each of those cases, the petition for redetermination was filed with the Tax Court more than 90 days after the mailing of the notice of the deficiency by the Commissioner by certified mail. Nevertheless, the courts held that the petition was timely filed and that the taxpayer had the right to a hearing on the merits in the Tax Court.

In *Dolezilek* v. *Commissioner*, 212 F. 2d 458, the Court of Appeals for the District of Columbia left undecided the precise question raised in the instant case. However, in a powerful dissenting opinion one Judge commented at page 462:

> "One cannot be expected to petition for review of an assessment of which he knows nothing. The purpose of notice is to inform. A notice sent out but not received is no information to the addressee, and ought not to start the running of limitation."
>
> "One can conceive, for example, of a situation wherein a trainload of mail would be destroyed by fire. Does such an Act of God completely deprive a taxpayer of a right which statute has granted to all other taxpayers?"

Accordingly, we submit that the issuance of a notice of deficiency without receipt of that notice by a taxpayer who has kept the Commissioner properly advised as to his address, is no notice at all within the meaning of the statute. Such a notice is a nullity for the purposes of commencing the tolling of the 90 day period within which taxpayer may file his petition for redetermination.

2. The question presented is of importance in the administration of the Federal Tax laws. It involves the basic question of whether the taxpayer, who fails to receive actual notice of deficiency without any fault on his part, can be deprived of an opportunity for a hearing on the merits before payment of the additional amounts of the taxes alleged to be due from him. In the cases of those taxpayers who are financially unable to pay the deficiency alleged against them and sue for refund, the deprivation of a hearing in the Tax Court is, in effect, a total deprivation of the constitutional right to an opportunity to be heard.

That the matter is of concern to the tax bar and tax litigants is attested to by the fact that the question has been raised in one form or another in numerous tax court, district court and circuit court proceedings. In fact, the Commissioner himself has indicated confusion and inconsistency as to his own construction of Section 6212. As the Court pointed out in *Tenzer* v. *Commissioner*, *supra*:

> "In approaching this case, it should be pointed out that in its brief in *Boren* v. *Riddell*, *the Commissioner plainly took the position that actual notice was necessary.* Now he contends that the mailing to Tenzer was enough without actual delivery, impliedly, we think, repudiating his argument in *Boren*." (Italics our own.)

Settlement of the question by this court is plainly in the public interest, since it is likely to be presented in almost every case in which a taxpayer does not receive actual notice without any fault on his part.

3. The decision of the Court below is believed to be erroneous and the conflicting decisions of the Circuit Court of Appeals for the Ninth Circuit in *Rosewood Hotel, Inc* v. *Commissioner*, *Tenzer* v. *Commissioner*, *Eppler* v. *Commissioner*, and *Boren* v. *Riddell*, *supra*, and the decision of the

Circuit Court of Appeals for the Sixth Circuit in *Stewart* v. *Commissioner*, *supra*, are correct. Moreover, the decisions below conflict in principle with applicable decisions of this Court. It is generally agreed that this Court has held that a fundamental requirement of due process of law under the Fifth Amendment requires that the party affected by a determination be given notice and an opportunity to be heard as a matter of right, and not of grace. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259 (1928). In construing a statute, the Court should indulge in the presumption of the constitutionality of the statute and should at all times construe it in such a manner as to sustain its constitutionality. *O'Gorman and Young* v. *Hartford Fire Insurance Co.*, 228 U. S. 251, 257, 51 S. Ct. 130, 75 L. Ed. 324, 72 A. L. R. 1163 (1931). However, the view taken by the Court below would deprive a taxpayer of an opportunity to be heard in the Tax Court, without any fault or negligence on his part. Such a view, we submit, is diametrically opposed to our traditional standards of fairness, and raises substantial questions of lack of due process of law.

This Court has consistently preserved individual rights from encroachments by the government. The individual's right to notice and a hearing in civil litigation is no less deserving of protection merely because the individual's adversary is the Commissioner of Internal Revenue and the subject of the litigation is liability for federal income taxes.

4. The petitioners in this case filed their petition with the Tax Court by mailing it within ten days after actual receipt of the notice of deficiency. They clearly acted with reasonable dispatch and their action was sufficient to grant jurisdiction to the Tax Court under the applicable statutory provisions.

5. Section 6212 (b) provides that the notice is sufficient if mailed to a taxpayer at his last known address "even if the taxpayer is deceased, or is under a legal disability or, in the case of a corporation, has terminated its existence."

It thus provides a method by which the Commissioner may furnish a notice of deficiency, without actual notice, to those taxpayers who have failed to advise the Commissioner of any change in address or status. By the same token, this subsection implies that the opposite is also true, namely that a taxpayer who has advised the Commissioner as to any change of address or remains at the address set forth in the return, is entitled to actual notice. If this were not the meaning to be attached to the general provisions of Sections 6212 (a), then there would be no purpose or necessity for making special provision under 6212 (b) for those taxpayers who had not advised the Commissioner of their last known address. It is certainly unlikely that Congress intended to deprive a taxpayer of a right to a hearing in the Tax Court, simply by reason of the unfortuitous circumstance that a letter was not delivered to him at his proper address.

6. Nor can one say that the taxpayer has not lost his right to a hearing, simply because of the alternative method available, namely to pay the tax and sue for refund. The constitutional right to a hearing must be based on actual not theoretical rights. If, as is true in this case, as in many others, the taxpayer has a meritorious defense but is without funds to pay the tax assessed by the Commissioner, then of course he cannot pursue the alternative remedy. The only real opportunity he has to be heard is to be granted a hearing in the Tax Court, prior to payment of tax.

It is manifest, we submit, that it was the congressional intent to grant this remedy to all taxpayers who advise the Commissioner of their last known address.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

BENEDICT KRIEGER,
*Attorney for Petitioner.*

HERBERT C. KLEIN,
*Of Counsel.*

# APPENDIX A

## Opinion of the United States Court of Appeals

(Filed—January 9, 1963)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,991

WILLIAM H. WILSON and ADRIANA J. WILSON,

Petitioners,

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

Argued December 3, 1962

Before BIGGS, *Chief Judge* and STALEY, *Circuit Judge*, and LEAHY, *District Judge*

PER CURIAM.

We have examined the opinion of the Tax Court and can perceive no error in either the statement of operative facts or in the application of the law thereto. Consequently the decision will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX B

## Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,991

WILLIAM H. WILSON and ADRIANA J. WILSON,

Petitioners,

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: BIGGS, *Chief Judge*, and STALEY, *Circuit Judge*, and LEAHY, *District Judge*.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

January 9, 1963

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 995

WILLIAM H. WILSON AND ADRIANA WILSON,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 10a–14a [1]) is not officially reported. The opinion of the court of appeals (Pet. 13) is reported at 311 F. 2d 228.

### JURISDICTION

The judgment of the court of appeals was entered on January 9, 1963 (Pet. 14). The petition for a writ of certiorari was filed on April 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." and "Supp. R." refer, respectively, to the appendix to the taxpayers' and Commissioner's briefs in the court of appeals.

## QUESTION PRESENTED

Whether the Tax Court lacked jurisdiction of taxpayers' petition for redetermination of their income tax liability for 1950 through 1954 because of failure to file the petition within the time prescribed in Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954.

## STATUTES INVOLVED

Sections 6212(a) and (b), 6213(a) and (c) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 7–8.[2]

## STATEMENT

On January 17, 1961, the Commissioner mailed, by certified mail, notices of deficiencies in income tax for the years 1950 through 1954 to the last known addresses of the taxpayers—one to their home address at 201 Bell Avenue, Hasbrouck Heights, New Jersey, and one to the office of the taxpayer-husband at 345 Boulevard in the same city. Although the notices were correctly addressed, they were not actually received by the taxpayers (R. 9a, 10a; Supp. R. 3a). An affidavit of the Post Office mail carrier shows that delivery was attempted at the husband-taxpayer's office but that, either because the taxpayer-husband's secretary would not sign for delivery or because the office was closed, he left a notice that the certified letter could be picked up at the local post office (R. 9a–10a).

[2] Section 272 (a)(1) and (k) of the Internal Revenue Code of 1939, applicable to the years 1950 through 1953, is substantially similar to Sections 6212 and 6213 of the Internal Revenue Code of 1954.

On August 4, 1961, the taxpayers mailed a petition for redetermination of the deficiencies to the Tax Court, which was filed on August 7, 1961, 202 days after the deficiency notices had been mailed. On September 29, 1961, the Commissioner filed a motion to dismiss the petition since it had not been filed within 90 days of the notices of deficiency as required by Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954. On October 3, 1961, the Tax Court ordered the case dismissed for lack of jurisdiction unless the taxpayers filed written objections to the order by October 24, 1961. Written objections were filed and a hearing was held on the Commissioner's motion to dismiss. On January 2, 1962, the Tax Court ordered that its previous order of October 3, 1961, dismissing the case for lack of jurisdiction, be made absolute (R. 1a–14a). The court of appeals affirmed *per curiam* (Pet. 13).

## ARGUMENT

1. The court below properly affirmed the Tax Court's dismissal for lack of jurisdiction of the taxpayers' petition for redetermination on the ground that the petition was not timely filed. Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954, Appendix, *infra*, pp. 7–8, require that a petition for redetermination of a tax deficiency determined by the Commissioner be filed with the Tax Court within 90 days after the mailing of the notice of deficiency. It is undisputed that the Commissioner

mailed on January 17, 1961, two notices of deficiency properly addressed, and that the taxpayers' petition for redetermination was not filed until August 7, 1961, long after the 90-day period allowed by the statute (R. 1a, 10a; Supp. R. 3a).

The Tax Court is a tribunal of limited jurisdiction (*Commissioner* v. *Gooch Co.*, 320 U.S. 418), and the timely filing requirement is jurisdictional (*Bloch* v. *Commissioner*, 254 F. 2d 277 (C.A. 9); *Underwriters, Inc.* v. *Commissioner*, 215 F. 2d 953 (C.A. 3); *Mindell* v. *Commissioner*, 200 F. 2d 38 (C.A. 2); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592. Consequently, it is well established that an untimely petition must be dismissed. *Bloch* v. *Commissioner, supra; Jorgensen* v. *Commissioner*, 246 F. 2d 536 (C.A. 9); *Galvin* v. *Commissioner*, 239 F. 2d 166 (C.A. 2); *Firnhaber* v. *Nelson*, 209 F. Supp. 777 (E.D. Wis.); *Heaberlin* v. *Commissioner*, 34 T.C. 58.

2. Petitioner contends, however, that the two notices which were mailed to him but not delivered did not start the running of the 90-day period because actual notice is required. However, Section 6212(b)(1) of the 1954 Code provides that the mailing of notice to the taxpayer's last-known address is sufficient and Section 6213(a) states that the 90-day period runs from the time the notice is mailed. The Courts have followed this plain language and held that "actual receipt of the notice by the taxpayers is not required in order that the statutory filing period commence." *Boccuto* v. *Commissioner*, 277 F. 2d 549,

552 (C.A. 3); accord, *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (C.A. 2).

Contrary to the taxpayers' contention (Pet. 7–10), there is no conflict of decisions. None of the cited cases hold that actual receipt of the deficiency notice is required by the statute. In *Tenzer* v. *Commissioner*, 285 F. 2d 956 (C.A. 9); *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7); and *Boren* v. *Riddell*, 241 F. 2d 670 (C.A. 9), earlier registered mailings were held to have been abandoned by subsequent manual delivery or remailings. The issue in *Rosewood Hotel, Inc.* v. *Commissioner*, 275 F. 2d 786 (C.A. 9), was whether the notice of deficiency was correctly sent to the last-known address of the taxpayer, and the case was remanded to the Tax Court for a finding as to the taxpayer's last-known address. In *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6), the Commissioner had failed to send a registered notice of deficiency which was correctly addressed, but since the taxpayer had received actual notice it was held that the purpose of the statute was accomplished so as to give the Tax Court jurisdiction. The court did not hold that actual notice is required in addition to compliance with the statutory method.

3. Taxpayers' contention (Pet. 10) that the Tax Court's interpretation of the statute would deprive the taxpayers of due process of law guaranteed by the Fifth Amendment is without merit. The Fifth Amendment guarantees no particular form of procedure; instead, it protects substantial rights. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275; *National Labor Relations Board* v. *MacKay Co.*,

304 U.S. 333, 351; see *Cohen* v. *United States*, 297 F. 2d 760 (C.A. 9), certiorari denied, 369 U.S. 865. Since the taxpayers have the right to contest the validity of the tax by paying the deficiency, filing a claim for refund and, if that be denied, suing for a refund of the amount paid plus interest, they have not been denied the right to a hearing. Accordingly, the failure of the statute bestowing jurisdiction to require that a taxpayer be given actual notice of the deficiency prior to assessment—even assuming that said notice would otherwise be necessary—is not a denial of due process.

## CONCLUSION

For the above-stated reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
LOUIS F. OBERDORFER,
*Assistant Attorney General.*
MEYER ROTHWACKS,
CAROLYN R. JUST,
*Attorneys.*

MAY 1963.

## APPENDIX

**Internal Revenue Code of 1954 (26 U.S.C.):**[1]

SEC. 6212 [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) *Address for Notice of Deficiency.*—

(1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

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SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if

[1] Section 272(a)(1) of the Internal Revenue Code of 1939 (as amended by Section 168(a) of the Revenue Act of 1942, 56 Stat. 798, and Sec. 203(a) of the Act of December 29, 1945, 59 Stat. 669), relating to the sending of the notice of deficiency by the Commissioner and the filing of a petition for redetermination with the Tax Court, and Section 272(k), relating to the address for the notice of deficiency, are applicable for the years 1950 through 1953. Insofar as this case is concerned, those sections are substantially the same as Sections 6212 and 6213 of the 1954 Code and, consequently, are not set forth.

the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

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(c) *Failure to File Petition.*—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

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